Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

Words, Inc.,
Petitioner

v.

Norman Singer; Piper Marbury Rudnick Wolfe, L.L.P.; Jackson & Campbell, P.C.; Singer and Associates, P.C., and John Craig,
Respondents

SUPPLEMENTAL APPENDIX NO. 1 TO WORDS, INC. PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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January 2004

Table of Contents to Supplemental Appendix

Petitioner's Filings with the D.C. Court of Appeals:

Appellant Words, Inc.'s Motion to Invoke Appeal Jurisdiction Pursuant to May 30, 2002, Rule 41(a)(1) Notice to Superior Court Stating Intent to Appeal and May 30, 2002 "Rule 59(e)" Motion, Each Providing Functional Equivalent of D.C.C.A. Rule 3(a) Notice of Appeal, Dec. 11, 2002.....2

Appellant Words, Inc.'s Rule 40 Petition for Rehearing and Rehearing En Banc of November 27, 2002 Decision and Rule 41(a) Motion to Stay Mandate, Dec. 11, 2002.....12

Appellant Words, Inc.'s Rule 40 Petition Rehearing and Rehearing En Banc of February 2, 2003 Merits Division's Denial of Words' December 11, 2002 Motion to Invoke Appeal Jurisdiction Pursuant to May 30, 2002 Appeal-intent Filings; and Rule 41(A) Motion to Stay Mandate, March 2, 2003.....20

DISTRICT OF COLUMBIA COURT OF APPEALS

WORDS, INC.

APPEAL NO. 02-CV-1123

V.

(D.C. Sup. Ct. Civ. 00-05875)

PIPER MARBURY RUDNICK WOLFE, L.L.P.; NORMAN SINGER; JACKSON & CAMPBELL, P.C., ET AL.,

Appellant Words, Inc.'s Motion to Invoke Appeal Jurisdiction Pursuant to May 30, 2002, Rule 41(a)(1) Notice to Superior Court Stating Intent to Appeal and May 30, 2002 "Rule 59(e)" Motion, Each Providing Functional Equivalent of D.C.C.A. Rule 3(a) Notice of Appeal

In this jurisdiction dispositive motion for which appellant did not seek consent of the other parties and for which appellant expects opposition, appellant moves as follows:

Plaintiff's Rule 41(a)((1)(i) Notice of Voluntary Dismissal of First Amended Complaint Count 2 and Count 3, docketed with the Superior Court Civil Division Clerk on May 30, 2002 after service on all parties[1], states in its first

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1. A copy of this Rule 41(a) Notice document, without the May 30, 2002 Superior Court docket stamp, was brought to the Court's attention by appellees in their joint motion to dismiss asserting that Words, Inc. May 30, 2002 "Rule 59(e)" Motion did not toll the time for appeal.

sentence that "Owing to plaintiff's desire to appeal as a final order Judge John Bayly's May 15, 2002 grant of summary judgment for all defendants on Count 1 of the original (and First Amended) Complaint, plaintiff Words, Incorporated notes its voluntary dismissal of the First Amended Complaint and Counts 2 and Count 3 pleaded in the First Amended Complaint."

This language in the captioned Sup. Ct. Civ. Rule 41 Notice declares Words, Inc. intent to appeal and meets all of the requirements for perfecting an appeal of Judge Bayly's May 15, 2002 summary judgment for defendants set forth in D.C. Court of Appeals Rule 3(a) and Rule 4(a)(1). No particular form for a notice of appeal is required, as long as the document reaches the Clerk before the 30 days appeal time as expired, is signed by a corporate appellant's counsel, specifies the party taking the appeal, and designates the order appealed from. D.C. Court of Appeals Rule 3(a). The Superior Court Civil Rule 41 Notice of this appellant Words, Inc. was docketed on May 30, 2002 by the Superior Court's Civil Division Clerk, Exh. 1, and fulfilled every one of these threshold requirements of D.C. Court of Appeals Rule 3(a).

Appellant Words, Inc. hereby invokes this Court's jurisdiction on the basis of this May 30, 2002 Notice document filed with the Superior Court. This May 30, 2002 Notice document is the functional equivalent of a formal D.C.C.A. Rule 3(a) Notice of Appeal, and is manifestly sufficient to invoke the appeal jurisdiction of this Court to review the May 15, 2002 final order of the trial court granting summary judgment to the legal malpractice defendants and denying summary judgment for plaintiff.[2] It

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2. This Motion to invoke the appeal jurisdiction of this Court on the basis of the May 30, 2002 Rule 41 motion

is also proper for Words, Inc. to invoke appeal jurisdiction in this fashion and at this stage of the appeal. *See Circle Liquors Inc. v. Cohen*, 670 A. 2d 381, 385 (D.C. App. 1996)(Court *sua sponte* raised jurisdictional issues after oral argument on merits; Court also *sua sponte* examined record to determine if offer of Remittitur filed by appellant with trial court within seven days after verdict could be considered an appeal tolling motion under D.C. App R. 4(a)(1); issue of whether the Remittitur stated intent to appeal was not asserted by appellant or considered by Court.)

Argument

1. **The D.C.C.A. Rule 3(a) standards for adequacy of a Notice of Appeal are interpreted liberally, like its counterpart in Federal Rules of Appellate Procedure 3(a) and 3(c), and require acceptance of the May 30, 2002 "Notice" filing and the May 30, 2002 Rule 59 (e) Motion as the functional equivalents of a Notice of Appeal.**

The May 30, 2002, Sup. Ct. Civ. Rule 41(a)

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docketed with the Superior Court, is filed simultaneously with a D.C. App. R.(a) Petition for Rehearing by Panel and Rehearing En Banc and Motion for Stay of Mandate of this Court's November 27, 2002 Decision. That November 27, 2002 decision held that Words, Inc. May 30, 2002 "Rule 59(e)" motion was insufficient to toll the time for appealing Judge Bayly's May 15, 2002 summary judgment order and that a September 27, 2002 Notice of Appeal was untimely. Given that Words, Inc. is now invoking the functional equivalent of a timely (May 30, 2002) notice of appeal to establish this Court's jurisdiction, the November 27, 2002 Decision no longer arises from a real controversy, is advisory, and should be vacated as moot.

Notice filed by the appellant Words, Inc. declared the intent of Words, Inc. to seek the relief of timely appealing the trial court's May 15, 2002 decision and order granting summary judgment to the defendants. Indeed, the Rule 41(a)(i) Notice of voluntarily dismissing the new counts in the First Amended Complaint was entirely dedicated to clearing any possible final order impediments on Judge Zoe Bush's calendar so that Judge John Bayly's May 15, 2002 summary judgment for defendants could be appealed.[3] The May 30, 2002 Rule 41 Notice document was not, however, conditioned on or linked to a Rule 59(e) Motion that Words, Inc. also filed on May 30, 2002; indeed the May 30, 2002 Sup. Ct. Civ. Rule 41 Notice did not even refer to the Rule 59 motion filed on the same day. Nor was the May 30, 2002 Rule 41 Notice filing conditional on any future act of a judge or party.

A. Analogous Federal Rules of Appellate Procedure

The lack of a specific the words "of Appeal" after "Notice" in the caption, or the lack of specific filing fee or multiple copies of the appeal document, are not jurisdictional and cannot defeat use of this May 30, 2002 "Notice" as a Rule 3(a) notice of appeal. *Montgomery v. Docter, Docter, and Salus*, 578 A. 2d 176 (1990)(absence of notice of appeal filing fee and lack of requisite 8 copies was not jurisdictional and appeal document therefore satisfied Rule 3(a), even though it was initially rejected by the Clerk's office and not refiled with filing fee and copies

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3. Though the Words, Inc. v. Singer case moved to Judge Bush's calendar on January 1, 2002, Sup. Ct. Civ. R. 40-I(a), Judge Bayly sua sponte retained the motions for summary judgment filed in December 2001 and decided these motions on May 15, 2002.

until after 30 day appeal period expired).[4] The *Montgomery v. Docter* opinion called for liberal interpretation of D.C. App. R. 3(a), and relied heavily on Federal court interpretations of analogous Fed. Rule of Appellate Procedures 3(a) and 3(c), especially *Parissi v. Telechron, Inc.*, 349 U.S. 46, 99 L. Ed 867 (1955), holding that timely notice of appeal was not rendered invalid by lack of a timely filing fee required by statute.

This Court has continued to follow the *Montgomery v. Docter* directive to evaluate appeal invocation disputes under the D.C. App. Rules by examining Federal court interpretation of analogous Federal Rules of Appellate Procedure. *In Re J.W.*, 763 A. 2d 1129, 1131 (D.C. 2000), this Court cited to the F.R.A.P. and held in a juvenile criminal matter that the prosecutor's failure to file a mandatory Certificate on a suppression issue, did not deprive the Court of appeal jurisdiction because the notice of appeal was timely filed and signaled the appellant's intent to appeal. See also *Moore Energy Inc. v. Public Service Comm.*, 785 A. 2d 300, 305 (D.C. 2001)(citing to F.R.A.P. 15 precedents and excusing D.C. App. R. 15(a) requirement that Petition for Review from a corporation be signed by counsel; also citing preference in *Abell v. Wang*, 697 A. 2d 796, 800 (D.C. 1997), for this Court to hear issues on their merits). This Court should adhere to its use of Federal court precedents in deciding D.C. App. R. 3(a) issues, and should accordingly adopt the functional equivalency test to accept Words, Inc. May 30, 2002 appeal documents as properly invoking jurisdiction.

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4. The nature of a motion is determined by the relief sought and not the label or caption.
Wallace v. Warehouse Employees Union #730, 482 801, 804 (D.C. 1984).

B. Functional Equivalency Test in Federal Appeals

In *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F. 2d 881, 889 (D.C. Cir. 1987), the leading case on adequacy of appeal-invoking documents from the U.S. Court of Appeals for the District of Columbia Circuit, our Circuit Court endorsed a functional equivalency standard and held that even a F.R.A.P. 10(b) filing, stating *merely* that no transcript would be ordered for an appeal, signaled the appellant's intent to appeal sufficiently to satisfy the notice of appeal requirements in F.R.A.P. 3.[5] *Nichols v. Asbestos Workers* is highly instructive to the appeal here, because the appellant Nichols filed a premature formal Notice of Appeal that was deemed ineffective but appellant was saved[6] by her filing the transcript declination within the correct appeal time. Appellant Words, Inc. filed, prior to Judge Bayly's May 15, 2002 Order becoming final on June 14, 2002, both a Rule 59(e) motion (held by this Court to be non-tolling) and a Rule 41 Notice stating its intent to appeal. Both documents timely signaled Words, Inc. intent

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5. See also Interstate Natural Gas Ass'n v. F.E.R.C, 756 F. 2d 166, 170 (D.C. Cir. 1985), holding that petitions for mandamus can be treated as notices of appeal ". . . because the content requirements of a notice of appeal. . . .may easily be met by a document of similar import, and the interests of justice may demand its acceptances as an effective substitute." [emphasis supplied].

6. See also Good Samaritan Hospital v. Sullivan, 952 F. 2d 1017, 1022 (8th Cir. 1991)(proffered Notice of Appeal was defective but Appeal Information Form filed within appeal time was functional equivalent of notice of appeal and invoked jurisdiction).

to appeal[7] and each can invoke this Court's jurisdiction.

In 1992, the U.S. Supreme Court overruled the three circuits that had denied use of an appellant brief as a substitute for a notice of appeal, and endorsed the functional equivalency doctrine for notices of appeal under F.R.A.P. 3. *Smith v. Barry*, 502 U.S. 244, 112 S. Ct. 678, 116 L. Ed 2 678 (1992), reversing *Smith v. Galley*, 919 F. 2d 893 (4th Cir. 1990). The Supreme Court held that a pro se appellant's notations on a pre-printed issues form--an informal brief and not even an informal notice of appeal–that was timely sent to the Court by the appellant[8], provided sufficient notice of intent to appeal to the U.S. Court of Appeals for the Fourth Circuit and therefore satisfied F.R.A.P. 3, *Smith v. Barry*, 502 U.S. 244, 112 S. Ct. 678, 116 L. Ed 2 678 (1992):

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7. The request for Remittitur filed seven days after the judgment and that was determined non-tolling for appeal purposes in Circle Liquors, Inc. v. Cohen, 670 A. 2d 381, 385 (D.C. 1996), did not mention the word "appeal" and was not asserted by the appellant to be the functional equivalent of a notice of appeal or a declaration of intent to appeal.

8. Under both F.R.A.P. 3 and D.C. App. R. 3(a), the Notice of Appeal is to be filed in the trial court. Both F.R.A.P. 4(d) and D.C. App. R. 4(a) mandate that a notice of appeal first filed wrongly in the Federal Court of Appeals or in the District of Columbia Court of Appeals shall be transmitted to the trial court but shall be deemed filed in the trial court on the date wrongly filed in the appeals court. The appellant Smith sent his notations on a pre-printed issue sheet for pro se appellants–an informal brief–to the Fourth Circuit within the appeal time and thus came under the saving clause of F.R.A.P. 4(d).

[t]he notice afforded by a document, not the litigant's motivation in filing it, determines the documents sufficiency as a notice of appeal. If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.

Smith v. Barry, 502 U.S. at 248.

The federal courts interpretation of F.R.A.P. 3 since *Smith v. Barry* has permitted invocation of appellate court jurisdiction under functional equivalency in far less innocent circumstances presented by Words, Inc. filing two documents on May 30, 2002 declaring intent to appeal within the appeal time. *Sinclair Broadcasting Corp. v. Federal Communications Comm.*, 284 F. 3d 156, 159 (D.C. Cir. 2002)(intent to appeal inferred from petitioner's statement of issues, despite F.R.A.P. 15 defect in Petition for Review of not identifying exact FCC Order appealed from). See also *Ruggierio v. Federal Communications Comm.*, 278 F. 3d 1323, 1327 (D.C. Cir. 2002)(timely brief was a functional equivalent of a F.R.A.P. 15 Petition for Review and invoked appeal jurisdiction); *Rinaldo v. Corbett*, 256 F. 3d 1276, 1279 (11th Cir. 2001)(motion for extension of time to appeal filed within appeal time was functional equivalent of F.R.A.P. 3 Notice of Appeal); *Haugen v. Nassau County Dep't of Soc. Services*, 171 F. 3d 136, 137 (2d Cir. 1999), citing *Smith v. Barry* and holding that even though the District Judge denied a letter-request for extension of time to file an appeal, the letter requesting the extension was filed within the appeal limit, identified the parties and judgment appealed from, and was the functional equivalent of a notice of appeal that invoked appellate

jurisdiction. [9]

C. The non-tolling Rule 59(e) Motion declared intent to appeal

While this Court should not have to reach the issue given the complete functional equivalency of the May 30, 2002 Rule 41 Notice to a D.C. App. R. 3(a) Notice of Appeal, Words, Inc. notes that the separate May 30, 2002 "Rule 59(e)" Motion four times mentions (including citing to this Appeals Court Rule 10) Words, Inc.'s intent to appeal Judge Bayly's May 15, 2002 Order granting summary judgment to the legal malpractice defendants and denying summary judgment to plaintiff. Under the liberal and appeal-inclusive interpretation of D.C. App. R. 3 and the analogous F.R.A.P. 3 endorsed by this Court, the D.C. Circuit, and the U.S. Supreme Court, the May 30, 2002 "Rule 59(e)" motion sufficiently declared Words, Inc. intent to appeal Judge Bayly's May 15, 2002 order and decision so that the Rule 59 motion separately and timely invoked this Court's appeal jurisdiction. There can be no mistake from the Rule 59(e) motion that the requirements of intent to appeal, party identification, signature by corporate appellant's counsel, and naming the order appealed from as per D.C.C.A. Rule 3(a), were all complied with, as was the functional equivalency doctrine set forth supra.

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9. See also *Brannan v. United States*, 993 F. 2d 709, 710 (9th Cir. 1993)(pro se letter from prisoner to court asking "to get sentence reduced" was sufficient to serve as notice of appeal); *United States v. Ward*, 696 F. 2d 1315, 1318 (11th Cir. 1983), cert. denied, 461 U.S. 934 (1984)(defendant's letter to district court expressing intent to appeal and requesting appointment of attorney held sufficient to note appeal under F.R.A.P. 3).

The May 30, 2002 Sup. Ct. Rule 41(a) "Notice" filed by Words, Inc., also complied with every procedural requirement of D.C. Court of Appeals Rule 3(a), in that the intent to appeal the May 15, 2002 summary judgment decision was stated explicitly, the order appealed from was identified, the appealing party was named, the appealing corporations's counsel signed the document, and all parties were served with the document.

Conclusion

Words, Inc. hereby moves that the May 30, 2002 Rule 41 Notice document, and alternatively the separate Sup. Ct. Rule 59(e) Motion docketed on May 30, 2002, serve to invoke the appeal jurisdiction of this Court pursuant to D.C. App. R. 3(a) to review the May 15, 2002 final order of Judge Bayly of the D.C. Superior Court granting summary judgment to the defendants and denying plaintiff Words, Inc. own motions for summary judgment. The May 30, 2002 Rule 41(a) Notice filing and the May 30, 2002 Rule 59(e) motion are part of the Superior Court record, are each the legal functional equivalent of a D.C.C.A. Rule 3(a) notice of appeal, and cannot be repudiated. Finally it is the duty of this Court to promote the interests of justice and accept these May 30, 2002 documents as properly invoking the Court's appeal authority. *Circle Liquors, Inc. v. Cohen,* 670 A. 2d 381, 385 (D.C. 1996).

Respectfully submitted,
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Washington, D.C. 20006-2202

[Certificate of Service on all parties' counsel, December 11, 2002]

[Exhibit 1]

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WORDS, INC.

CIV. NO. 00-CA-05875

V.

PIPER RUDNICK, NORMAN SINGER, ET AL.

PLAINTIFF'S RULE 41(a)(1)(I) NOTICE OF VOLUNATARY DISMISSAL OF FIRST AMENDED COMPLAINT COUNT 2 AND 3

Owing to plaintiff's desire to appeal as a final order Judge John Bayly's May 15, 2002 grant of summary judgment for all defendants on Count 1 of the original (and First Amended) Complaint, plaintiff Words, Incorporated notes its voluntary dismissal of the First Amended Complaint and Count 2 and Count 3 pleaded in the First Amended Complaint. Plaintiff's Motion for Leave to File a First Amended Complaint adding[10] Count 2 and Count 3, is pending and should now be considered moot. This voluntary dismissal of the First Amended Complaint and the two new counts pleaded therein, is made before any defendant has filed an Answer or motion for summary judgment with respect to the new counts 2 and 3 in th First Amended Complaint. Rule 41(a)(1)(i).

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10. The First Amended Complaint repleads Count 1from the original Complaint *verbatim*. Judge Bayly's May 15, 2002 summary judgment ruling apply to this Count 1 of the original Complaint.

Pursuant to Rule 41(a), this voluntary dismissal of Counts 2 and 3 in the First Amended Complaint is without prejudice. Plaintiff may move to re-file the First Amended Complaint with Counts 2 and 3 should any remand of Count 1 occur after appeal.

Respectfully submitted,

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[Certificate of Service on all parties' counsel, May 29, 2002]

[Exhibit 1 follows]

DISTRICT OF COLUMBIA COURT OF APPEALS

WORDS, INC.

APPEAL NO. 02-CV-1123

V.

PIPER MARBURY RUDNICK WOLFE, L.L.P.; NORMAN SINGER, JACKSON & CAMPBELL, P.C., ET AL.,

(D.C. Sup. Ct. Civ. 00-05875)

APPELLANT WORDS, INC.'S RULE 40 PETITION FOR REHEARING AND REHEARING EN BANC OF NOVEMBER 27, 2002 DECISION AND RULE 41(a) MOTION TO STAY OF MANDATE

Argument for Rule 40 Rehearing and Rehearing En Banc

1. **Because of appellant's accompanying Motion invoking this Court's appeal jurisdiction pursuant to two, timely filed functional equivalents of a D.C. App. R. 3(a) Notice of Appeal, the November 27, 2002 Decision and any D.C. App. R. 41 mandate dismissing the appeal as untimely, should be stayed and then vacated as advisory and moot.**

The accompanying Appellant Words, Inc. Motion to Invoke Appeal Jurisdiction Pursuant to May 30, 2002 Rule 41(a)(1) Notice, and Rule 59(e) Motion to Superior Court Stating Intent to Appeal and Each Providing Functional Equivalent of a D.C. App. R. 3(a) Notice of Appeal, should require the motions panel of this Court to stay the November 27, 2002 Decision and Order dismissing the

appeal as untimely. The Rule 41(a) mandate should be stayed as well while appellant's Motion to Invoke Appeal Jurisdiction on the basis of the May 30, 2002 filings is decided by this Court. After the appellant's motion is granted to invoke jurisdiction on the basis of two timely functional equivalents of a Rule 3(a) Notice of Appeal, the November 27, 2002 Decision and Order dismissing the appeal should be vacated because it no longer arises from a real controversy, is advisory only, and has become moot.

It is completely proper to proceed in this sequence of staying the November 27, 2002 dismissal of the appeal owing to assertion of two separate and timely documents serving as functional equivalents of a Rule 3(a) Notice of Appeal filed with the Superior Court within 30 days of the May 15, 2002 Decision and Order of the trial court granting the legal malpractice defendants summary judgment and denying summary judgment to plaintiff. The jurisdictional issues contested here may be decided at any time. See *Circle Liquors, Inc. v. Cohen*, 670 A. 2d 381 (D.C. 1996)(jurisdiction raised *sua sponte* by Court after oral argument on merits, with Court also making *sua sponte* examination of record to determine if timely filed documents did toll appeal time); and *Moore Energy Inc, v. Public Service Comm.*, 785 A. 2d 300, 305 (D.C. 2001)(citing preference for hearing appeals of their merits and not scuttling them because of non-compliance with technical elements for a notice of appeal or petition for review). There is also no authority for penalizing appellant Words, Inc. for invoking jurisdiction in this fashion.

This Court should take up improvidence fo the petition for hearing and for hearing *en banc* on the merits of the November 27, 2002 Decision and Judgment only if this Court denies appellant Words, Inc. motion to invoke jurisdiction on the basis of the May 30, 2002 filings with the

Superior Court.

2. **Alternatively, the Court should reconsider and vacate the November 27, 2002 Decision as improvident and contrary to this Court's opinion in Circle Liquors Inc. v. Cohen, 670 A. 2d 381, 388 defining a tolling Rule 59(e) motion and contrary to D.C.C.A. Rule 3(a).**

This Court has never before judged compliance with Rule 4(a)(2) by using the trial judge's output after the proffered tolling motion is filed. The text of Rule 4(a)(2), especially Rule 4(a)(2) sub-phrase number three, plainly requires the tolling adequacy of the appellant's motion to be judged on the relief requested in the motion and **not** on the what relief the trial judge deems appropriate. In Words, Inc. May 29/May 30, 2002 Motion for Rule 59(e) Relief, Words, Inc. opened the motion with the sentence: "Pursuant to Rule 59(e), plaintiff moves the Court to both alter and amend the May 15, 2002 Order granting summary judgment to defendants and to permit supplementation of the record as follows." The appellant Words, Inc. then requested that the trial judge add to the May 15, 2002 summary judgment written decision (the "judgment") an explanation of the trial court's possibly improper and biased ex parte telephone calls to one to the defense counsel for defendant Jackson & Campbell, P.C. The addition to the summary judgment that was sought by appellant Words, Inc. was obviously to request the trial judge to add a clarification to the 25 page summary judgment opinion as to what standard of review the trial judge used in deciding to award Jackson & Campbell with summary judgment dismissal. The motions panel of this Court mistakenly faulted Words, Inc. for not alleging error or "factual assertions" as to the trial judge's conduct. How could Words, Inc. attack the trial judge's ex parte phone calls to one defense counsel when there was no

record of these calls?[11] To make a meaningful appeal on this standard of review issue, Words, Inc., without question, had to request Judge Bayly to admit in the record that he made the ex parte phone calls to his friend David Durbin who represented Jackson & Campbell. The Words, Inc. Rule 59(e) motion is worded this very way: "Plaintiff respectfully requests the Court, Judge John H. Bayly, Jr., to document for the record the reasons for and nature of any apparent expert parte telephone communications by the Court to Attorney David B. Durbin, counsel for then-defendant Jackson & Campbell, P.C.". There was no trial in this case, so the only "record" referred to is the 25 page, May 15, 2002 summary judgment opinion to which Judge Bayly added his written explanation of the ex parte phone calls in his August 30, 2002 written decision, which also denied plaintiff-appellant's motion to amend the record to include voluminous back up materials to commission summaries and excerpts included in the plaintiff's motion for summary judgment.

In the only case that this Court has analyzed the D.C. App. R.4(a)(2) tolling requirements for a timely proffered motion, the single criterion considered was that that the proffered motion ask the trial judge to do something affirmative, such as issue an order. *Circle Liquors, Inv. v. Cohen,* 670 A. 2d 381, 385 (D.C. 1996). The appellant Circle Liquor could only proffer a request for Remittitur of the jury's verdict, which this Court determined was not a tolling Rule 4(a)(2) motion because it asked only the other party Cohen to do something, i.e., accept less than

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11. Word, Inc.' motion reference to the ex parte phone calls was not record evidence that the call occurred. The recipient of Judge Bayly's two ex parte phone calls, defense counsel for defendant Jackson & Campbell, P.C., did not favor the record with any Affidavit explaining the calls.

the verdict amount, and did not ask the trial court to revise or alter the original order. In the present Words, Inc., case, the appellant Words, Inc.'s May 30, 2002 "Rule 59(e)" motion asked the trial judge to make an important alteration to the 25 page summary judgment decision by adding an explanation of the judge's ex parte phone calls to one of the successful defendant's lawyer prior to summary judgment briefing in the case. This Court wrongly measured the tolling prowess of Words, Inc.'s Rule 59(e) motion by stating "[T]he. . . trial court's explanation of the calls is not an additional factual finding." The inquiry should have been as to what the trial judge was asked to do by appellant Words, Inc., not what the trial court did after he was asked. In two prior cases where the appellant filed a timely request for the trial judge to "explain" "reconsider" or "clarify" his ruling, this Court treated the request as a tolling Rule 59(e) motion. These cases cannot be distinguished from what Words, Inc. requested of the trial judge on May 30, 2002 in its Rule 59(e) motion.

The Court also did not use the correct standard of review in deciding if appellant's Rule 59(e) motion satisfied the definitions of one or more of the five tolling motions in Rule 4(a)(2). In *Moore Energy Inc. v. Public Service Comm.*, 785 A. 2d 300, 305 (D.C. 2001), this Court cited analogous Federal court precedent interpreting the F.R.A.P. and permitted an appeal despite non-compliance with the D.C. App. R. 15(a) requirement that counsel sign a corporation's Petition for Review. The *Moore Energy* opinion stated the preference for promoting civil justice by deciding appeals on their merits rather than dismissing them on technical grounds, citing *Abell v. Wang*, 697 A. 2d 7967, 800 (D.C. 1997). In determining if Words, Inc. May 30, 2002 request to the trial judge that he explain his ex parte contacts with a successfully-dismissed defendant's lawyer, Words, Inc. was plainly attempting to fill in the standard of

review used by trial court so standard of review could be argued on appeal. The appellee-defendants all understood this and filed oppositions to the Rule 59(e) motion minimizing the importance of the ex parte phone calls. The trial court who used several pages to explain that his telephone calls to the defense counsel were for scheduling and did not address the merits.

The amended version of Rule 4(a)(2) plainly states in sub-phrase three that a motion to "vacate, alter, or amend the order or judgment" is a tolling motion. Words, Inc. by requesting Judge Bayly to add a written explanation of his ex parte conduct to the May 15, 2002 summary judgment opinion and order, textually satisfies both infinitives "to alter" and "to amend." This Court's November 27, 2002 decision never parses these terms in Rule 4(a)(2), and this mistake is magnified when sub-phrase 5 of Rule 4(a)(2), "and any other motion seeking relief in the nature of the foregoing" is used in the standard of review. Appellant Words, Inc. rightfully demanded of the trial judge that he add to the record an explanation of his ex parte conduct, and this demand fit properly into both sub-phrase two and sup-phrase five of D.C. App. R. 4(a)(2).

The motions panel of this Court stated that the trial judge did not make additional findings of fact
The trial judge did add an explanation of the ex parte telephone calls to the summary judgment decision documents; because the written summary judgment opinion constitutes the judgment appealed from, the addition of the ex parte contacts explanation to the summary judgment decision is also an "alteration" or amendment of the judgment that fully meets the tolling standard in Rule 4(a)(2), sub-phrase three.

3. A more liberal reading of D.C. App. R. 4(a)(2) should have been employed.

The Court also did not use the correct standard of review in deciding if appellant's Rule 59(e) motion satisfied the definitions of one or more of the five tolling motions in Rule 4(a)(2). In *Moore Energy Inc. v. Public Service Comm.*, 785 A. D 2d 300, 305 (D.C. 2001), this Court cited analogous Federal court precedent interpreting the F.R.A.P and permitted an appeal despite non-compliance with an explicit D.C. App. R. 15(a) requirement that counsel sign a corporation's Petition for Review. The appelles motion to dismiss also emphasized the need to follow the Federal courts interpretation of their appellate rules. The Moore Energy opinion stated the preference for promoting civil justice by deciding appeals on their merits rather than dismissing them on false "jurisdictional" grounds, citing *Abell v. Wang*, 697 A. 2d 7967, 800 (D.C. 1997). In determining if Words, Inc. May 30, 2002 request to the trial judge that he explain his ex parte contacts with a successfully-dismissed defendant's lawyer, Words, Inc. was plainly attempting to fill in the standard of review used by trial court so standard of review could be argued on appeal. The appellee-defendants all understood this and filed harsh oppositions to the Rule 59(e) motion minimizing the role of the ex parte phone calls. The trial court also grasped the importance of this matter for appeal and used several pages to explain that his telephone calls to the defense counsel were for scheduling, did not address the merits, and reflected no bias. This Court has treated even letters form counsel to the trial judge requesting "reconsideration" or explanation of a decision, as motions that satisfy Rule 4(a)(2). See, e.g., *Vincent v. Anderson*, 621 370 (D.C. 1993); *National Voter Contact, Inc. v. Versace*, 511 A. 2d 393, 396 (D.C. 1982).

Conclusion

The November 27, 2002 Decision and Order of this court and its Mandate, should be stayed pending consideration of appellant Words, Inc.' rights to invoke appellate jurisdiction on the basis of the two May 30, 2002 filed documents, as argued in Words, Inc. motion filed this day. After appeal jurisdiction is recognized, the November 27, 2002 Decision should be vacated as moot. Alternatively, the Court should vacate the November 27, 2002 as improvident on the merits and inconsistent with the liberal application of the D.C. App. Rules that recognize intent to appeal.

Respectfully submitted,

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[Certificate of Service on all parties' counsel, December 11, 2002]

DISTRICT OF COLUMBIA COURT OF APPEALS

WORDS, INC.,
APPELLANT

Appeal No. 02-CV-1123

V.

PIPER MARBURY RUDNICK WOLFE, LLP; NORMAN SINGER, ET AL., JACKSON & CAMPBELL, P.C., ET AL.,
APPELLEES

(D.C. Sup. Ct. Civ. 00-05875)

APPELLANT WORDS, INC.'S RULE 40 PETITION FOR REHEARING AND REHEARING EN BANC OF FEBRUARY 28, 2003 MERITS DIVISION'S DENIAL OF WORDS' DECEMBER 11, 2002 MOTION TO INVOKE APPEAL JURISDICTION PURSUANT TO MAY 30, 2002 APPEAL-INTENT FILINGS; AND RULE 41(A) MOTION TO STAY MANDATE

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TABLE OF CONTENTS

Table of Authorities.....i

Background to Words' Preservation of its Appeal Rights...2

Argument.....4

1. The Merits Division Denial of the Appellant-plaintiff's Motion to Invoke Appeal Jurisdiction on the Basis Two Timely Filed Appeal-intent Documents, is Violently at Odds with D.C. App. R. 3(a) Precedents Authored by Judges Other Than Merits Divisions Members.....4

2. This Court Must Defer to the Federal Courts' Highly Likely Acceptance of the Words' Alternative and Timely Appeal-Intent Documents Under the Functional Equivalency Doctrine.....6

Conclusion.....8

TABLE OF AUTHORITIES

Cases

Re J.W., 763 A. 2d 1129 (D.C. 2000).....4

Moore Energy Inc. v. Public Service Comm, 785 A. 2d 300, 305 (D.C. 2001).....4

Montgomery v. Docter , Docter, and Salus, 578 A. 2d 176 (D.C. 1990).....5

Circle Liquors Inc. v. Cohen, 670 A. 2d 381, 385 (D.C. 1996).....5, 6

Wellmore Coal Corp. v. Harmon Mining Corp., 264 VA. 279, 568 S.E. 2d 671 (Va. 2002).....5

Frain v. District of Columbia, 572 A. 2d 447, 450 (D.C. 1990).....6

Smith v. Barry, 502 U.S. 244, 112 S. Ct. 678, 116 L. ED 2 678 (1992).....7

Nichols v. Asbestos Workers Local 24 Pension Plan, 835 F. 2d 881, 889 (D.C. 1987).....7

Sinclair Broadcasting Corp. V. Federal Communications Comm., 284 F. 3d 156, 159 (D.C. Cir. 2002).....8

Ruggierio v. Federal Communications Comm., 278 F. 3d 1323, 1327 (D.C. Cir. 2002).....8

Rinaldo v. Corbett, 256 F. 3d 1276, 1279 (11th Cir. 2001)..8

Haugen v. Nassau County Dep't of Soc. Services, 171 F. 3d

137 (2d Cir.1999).....8

Brannan v. United States, 993 F. 2d 709, 710 (9th Cir. 1993).....8

United States v. Ward, 696 F. 2d 1315, 1318 (11th Cir. 1983, *cert denied*, 461 U.S. 934 (1984).....8

Rules

D.C. App. R. 41(a).....1

Federal Rules of Appellate Procedure 4.....2

Rule 59(e).....2, 3, 4, 7

D.C. App. R. 4(a)(2).....2

Plaintiff's Rule 41(a)(1)(i).....3

Sup. Ct. Civ. Rule 41.....3

D.C. App. R. 3(a).....3, 4

D.C. App. R. 4(a)(1).....3

Rule 41(a).....3

D.C. App. R. 15(a).....5

Federal Rules of Appellate Procedure 15.....5, 8

Rule 4(a)(2).....6

D.C. App. 3.....6

D.C. App. 4.....6

Federal Rules of Appellate Procedure 10(b).....7

Federal Rules of Appellate Procedure 3.....7, 8

Rule 41 Notice.....7

D.C. App. R. 4.....7

Rule 15(a)(2)(C).....8

DISTRICT OF COLUMBIA COURT OF APPEALS

WORDS, INC.,

V.

APPEAL NO. 02-CV-1123

PIPER MARBURY RUDNICK WOLFE, LLP; NORMAN SINGER, ET AL., JACKSON & CAMPBELL, P.C., ET AL.,

(D.C. Sup. Ct. Civ. 00-05875)

Appellant Words, Incorporated's Rule 40 Petition for Rehearing and Rehearing En Banc of February 28, 2003 Merits Division Denial of Appellant's Motion to Invoke Appeal Jurisdiction on Basis of Timely Filed Appeal-Intent Documents

The Court's February 28, 2003 *per curiam* order appears to confirm that the appellant's separate motion to appeal the May 15, 2002 order of the trial court on the basis of two appeal-intent documents filed on May 30, 2002, was not yet circulated to the Court *en banc.*

Because of the importance of this jurisdictional issue and avoidance by the merits division of several precedents of this Court, the U.S. Supreme Court and the U.S. Court of Appeals for the D.C. Circuit interpreting appeal-invoking filings, appellant is forced to request Rehearing and Rehearing *En Banc* of the February 28, 2003 order to deny appellant's appeal rights in this case.[12] At a minimum, the merits division should explain its refusal to discuss or

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12. Appellant Words also moves pursuant to D.C. App. R. 41(a) to stay the issuance of any mandate in this case.

endorse the functional equivalency doctrine under the Federal court interpretations of F.R.A.P. 4 that are powerful interpretive guides to the question presented. That doctrine would treat the filings by Words on May 30, 2002 as functional equivalents of a conventional Notice of Appeal of the May 15, 2002 order of the trial court.

Background to Words' Preservation of its Appeal Rights

After the trial judge issued a final order on May 15, 2002 granting defendants' motion for summary judgment in this legal negligence action, plaintiff-appellant Words on May 30, 2002 filed a Rule 59(e) captioned motion that sought to have the trial court amend the May 15, 2002 judgment order by adding an explanation of *ex parte* telephone calls the trial judge made to one of the defense counsel in this case in September 2001 and March 2002 that pertained directly to the case. The law firm client of that defense lawyer was one of the defendants dismissed by Judge Bayly's May 15, 2002 Order. The trial judge provided the explanation of the telephone calls in an August 30, 2002 Order that also ruled on certain costs petitions of the victorious defendants. Appellant-plaintiff Words filed a Notice of Appeal on September 27, 2002. This Court on November 27, 2002 ruled that Words' May 30, 2002 Rule 59(e) motion did not sufficiently request amendment of the May 15, 2002 judgement order in favor of defendants and therefore did not qualify under D.C. App. R. 4(a)(2) as a motion tolling the time for appeal of the May 15, 2002 order. Under this ruling, Words' September 27, 2002 formal Notice of Appeal was untimely to invoke appeal jurisdiction over the May 15, 2002 order of the trial court.

No Court or appellee has addressed Words' *other* means of invoking appeal jurisdiction on the basis of plaintiff's filings within 30 days of the May 15, 2002 order. Plaintiff's Rule 41(a)((1)(i) Notice of Voluntary Dismissal

of First Amended Complaint Count 2 and Count 3, docketed with the Superior Court Civil Clerk on May 30, 2002 after service on all parties[13], states in its first sentence that "Owing to plaintiff's desire to appeal as a final order Judge John Bayly's May 15, 2002 grant of summary judgment for all defendants on Count 1 of the original (and First Amended) Complaint, plaintiff Words, Incorporated notes its voluntary dismissal of the First Amended Complaint and Counts 2 and Count 3 pleaded in the First Amended Complaint." This language in the captioned Sup. Ct. Civ. Rule 41 Notice declares Words' intent to appeal and meets all of the requirements for perfecting an appeal of Judge Bayly's May 15, 2002 summary judgment for defendants set forth in D.C. App. R. 3(a) and R. 4(a)(1). No particular form for a notice of appeal is required, as long as the document reaches the Clerk before the 30 days appeal time has expired; is signed by a corporate appellant's counsel; specifies the party taking the appeal; and designates the order appealed from. D.C. App. R. 3(a). The Superior Court Civil Rule 41 Notice of this appellant Words, Inc. was docketed on May 30, 2002 by the Superior Court's Civil Division Clerk, Exh. 1, and fulfilled every one of these threshold requirements of D.C. App. R. 3(a).

Appellant Words, Inc. invokes this Court's jurisdiction on the basis of this May 30, 2002 Notice document filed with the Superior Court. This May 30, 2002 Notice document is the functional equivalent of a formal D.C. App. R. 3(a) Notice of Appeal, and is manifestly sufficient to invoke the appeal jurisdiction of this Court to review the May 15, 2002 final order of the trial court granting summary judgment to the legal malpractice

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13. A copy of this Rule 41(a) Notice document with the May 30, 2002 Superior Court docket stamp, is attached as Exhibit 1.

defendants and denying summary judgment for plaintiff.

In addition, the non-tolling Rule 59(e) motion also filed on May 30, 2002 specifically stated Words' intent to appeal and indeed asked for a record correction and record supplement to ensure a meaningful appeal record. The Rule 59(e) filing must be judged on what it stated and not on any label accompanying the motion.

Argument

1. **The Merits Division Denial of the Appellant-plaintiff's Motion to Invoke Appeal Jurisdiction on the Basis Two Timely Filed Appeal-intent Documents, is Violently at Odds with D.C. App. R. 3(a) Precedents Authored by Judges Other Than Merits Divisions Members.**

Rejection *ab initio* of Words' alternative appeal notices would be directly contrary to four decisions of this Court authored by non-division Judges who applied analogous F.R.A.P. principles to all but invoke the functional equivalency doctrine. In *Re J.W.*, 763 A. 2d 1129 (D.C. 2000), Judge Steadman, joined by J.J. Farrell and Glickman, cited to Federal court interpretations of F.R.A.P. to hold that in a juvenile criminal matter, the prosecutor's failure to file a mandatory Certificate of a suppression issue did not deprive this Court of jurisdiction because the notice of appeal was timely and signaled the appellant's intent to appeal. In *Moore Energy Inc. v. Public Service Comm*, 785 A. 2d 300, 305 (D.C. 2001), Judge Mack wrote for the Court (including Judge Reid of this merits division) that the mandatory requirement in D.C. App. R. 15(a) that a Petition for Review from a corporation be signed by counsel should be excused owing to the preference in F.R.A.P. 15 precedents to honor the appellant's stated intent to appeal and not scuttle the appeal

for technical reasons.[14]

In *Montgomery v. Docter, Docter, and Salus*, 578 A. 2d 176 (D.C. 1990), a *per curiam* decision from this Court's panel comprised of Judges Ferren, Steadman, and Pryor, granted jurisdiction upon a technically untimely Notice of Appeal. The original Notice of Appeal filing made within 30 days lacked a filing fee and the requisite eight copies; was rejected by the Superior Court's clerk's office; and was not refiled with the filing fee and copies until after the 30 day appeal period expired. Similarly in *Circle Liquors Inc. v. Cohen*, 670 A. 2d 381, 385 (D.C. 1996), Judge King with Judge Belson, but with Chief Judge Wagner dissenting to the dismissal of the appeal, required a search of the record to see if the appellant had properly

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14. This Court must be mindful to derivation of its appeal rules from the F.R.A.P., where Words May 30, 2002 appeal-intent documents would clearly be the functional equivalent of a formal and timely Notice of Appeal. Turning away Words' May 30, 2002 appeal-intent documents would wrongly cast this case into the jurisprudence of states who eschew the F.R.A.P. in their appeal rules. Virginia, for example, uses appeal rules completely independent of F.R.A.P. and recently rejected a civil defendant's appeal of a $6 million verdict because the defendant-appellant's notice of appeal was signed by the defendant's *pro hac vice* trial counsel who was not a member of the Virginia Bar. The signature on the Notice of Appeal ran afoul of Va. Supreme Ct. Rule 1A:4, which states that when foreign state counsel are admitted to a Virginia court upon courtesy for a particular case, " . . . a pleading, or other paper required to be served (whether relating to discovery or otherwise) shall be invalid unless it is signed by a member of the Virginia State Bar." *Wellmore Coal Corp. v. Harmon Mining Corp.*, 264 VA. 279, 568 S.E. 2d 671 (Va. 2002).

invoked appeal jurisdiction by filing "a paper" admittedly not labeled "Notice of Appeal".[15]

The results in these four cases authored by three Judges outside this merits division, are patently at odds with the refusal of the merits division to search the record for timely appeal-invoking documents. This contradiction and lack of uniformity in decisions should be of deep concern to the Court *en banc*. Both the merits division and the Court *en banc* should accept appellant Words' invocation of appeal jurisdiction on the basis of the two timely filed documents memorializing Words intent to appeal the trial judge's May 15, 2002 final order.

2. **This Court Must Defer to the Federal Courts' Highly Likely Acceptance of the Words' Alternative and Timely Appeal-Intent Documents Under the Functional Equivalency Doctrine.**

This Court's jurisdiction-invoking rules in D.C. App. 3 and 4 are derived from the analogous F.R.A.P., and well-settled Federal court interpretations of F.R.A.P. should be heeded by this Court

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15. The search of the record in *Circle Liquors* was largely *sua sponte* because the parties did not brief whether plaintiff's "Amended Remittitur Offer" filed seven days after the verdict, could be construed as an appeal-tolling motion. The *Circle Liquors* Court determined that the Amended Remittitur did not use any terms associated with a Rule 4(a)(2) tolling document. Chief Judge Wagner dissented, citing to the rule endorsed frequently by this Court and the legal malpractice defendants here, that the nature of a motion is determined by the relief sought, not by its label or caption, *Frain v. District of Columbia*, 572 A. 2d 447, 450 (D.C. 1990).

This merits division's denial of Words' motion to invoke appeal jurisdiction on the two May 2002 appeal-intent documents, is erroneous, especially given the U.S. Supreme Court holding in *Smith v. Barry,* 502 U.S. 244, 112 S. Ct. 678, 116 L. Ed 2 678 (1992), that an appellant's mere notations on a pre-printed, issue-identification form, filed within the appeal period, was the functional equivalent of a F.R.A.P. 3 notice of appeal and invoked appeal jurisdiction.

Well before *Smith v. Barry* was decided by the Supreme Court, our own circuit in *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F. 2d 881, 889 (D.C. 1987) endorsed the functional equivalency standard and held that even a F.R.A.P. 10(b) filing limited to declining a transcript, sufficiently signaled the appellant's intent to appeal to satisfy the notice of appeal requirements in F.R.A.P. 3. *Nichols* is highly instructive for the Words' appeal, because appellant Nichols filed a premature and void Notice of Appeal but was saved by her filing a transcript declination within the appeal time limit. Prior to Judge Bayly's May 15, 2002 Order becoming final on June 14, 2002, Words filed both a Rule 59(e) Motion[16] mentioning imminent appeal several times *and* a Rule 41 Notice dismissing a proposed First Amended Complaint and Motion for Leave to file this Amended Complaint. The latter stated Words' intent to appeal Judge Bayly's May 15, 2002 order as the very basis for withdrawing the proposed First Amended Complaint. Since the Supreme Court decision in *Smith v. Barry,* the federal courts interpretation of F.R.A.P. has applied functional equivalency in far less innocent circumstances than presented by Words here filing

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16. This Court determined this Rule 59(e) motion to be non-tolling under D.C. App. R. 4. This Court en banc declined to review this determination.

two documents on May 30, 2002 declaring intent to appeal. *Sinclair Broadcasting Corp. v. Federal Communications Comm.*, 284 F. 3d 156, 159 (D.C. Cir. 2002), inferred intent to appeal from the petitioner's statement of the issues, despite a flawed F.R.A.P. 15 Petition for Review that failed to comply with the mandatory Rule 15(a)(2)(C) term to specify the FCC order appealed from. See also *Ruggierio v. Federal Communications Comm.*, 278 F. 3d 1323, 1327 (D.C Cir. 2002)(timely brief was the functional equivalent of a F.R.A.P. Petition for Review and invoked appeal jurisdiction); *Rinaldo v. Corbett*, 256 F. 3d 1276, 1279 (11th Cir. 2001)(motion for extension of time to appeal itself filed within appeal time was functional equivalent of F.R.A.P. 3 Notice of Appeal); *Haugen v. Nassau County Dep't of Soc. Services*, 171 F. 3d 137 (2d Cir. 1999), citing *Smith v. Barry* and holding that even though the District Judge denied a letter-request for extension of time to file an appeal, the letter requesting the extension was filed within the appeal limit, identified the parties and judgment appealed from, and was the functional equivalent of a notice of appeal to invoke appeal jurisdiction.[17]

Conclusion

To ensure uniformity of decisions within this Court and with the U.S. Supreme Court and U.S. Court of Appeals for the D.C. Circuit accepting analogous F.R.A.P. functional equivalents of notices of appeal, the merits

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17. See also *Brannan v. United States*, 993 F. 2d 709, 710 (9th Cir. 1993)(pro se letter from prisoner to court asking "to get sentence reduced" was sufficient to serve as notice of appeal); and *United States v. Ward*, 696 F. 2d 1315, 1318 (11th Cir. 1983, *cert denied*, 461 U.S. 934 (1984)(defendant's letter to District Court expressing intent to appeal and requesting appointment of attorney held sufficient to note appeal under F.R.A.P. 3).

division and the Court *en banc* must grant appellant's motion to invoke appeal jurisdiction on the basis of the two appeal-intent documents filed on May 30, 2002. These timely-filed documents put into writing clear and unmistakable intent of Words to appeal the trial judge's May 15, 2002 order.

Respectfully submitted,

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